

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

PLANNED PARENTHOOD FEDERATION OF
AMERICA, INC., and PLANNED
PARENTHOOD OF NORTHERN NEW
ENGLAND, INC.

Plaintiffs,

19 Civ. 5433 (PAE)

-v.-

XAVIER BECERRA*, *in his official capacity as Secretary,
United States Department of Health and Human Services;*
UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES; MELANIE FONTES RAINER*, *in her
official capacity as Director, Office for Civil Rights, United
States Department of Health and Human Services;* and
OFFICE FOR CIVIL RIGHTS, *United States Department of
Health and Human Services,*

Defendants.

NATIONAL FAMILY PLANNING AND
REPRODUCTIVE HEALTH ASSOCIATION, and
PUBLIC HEALTH SOLUTIONS, INC.,

Plaintiffs,

-v.-

XAVIER BECERRA*, *in his official capacity as Secretary
of the U.S. Department of Health and Human Services;*
U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES; MELANIE FONTES RAINER*, *in her official
capacity as Director of the Office for Civil Rights of the U.S.
Department of Health and Human Services;* and OFFICE
FOR CIVIL RIGHTS OF THE U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

19 Civ. 5435 (PAE)

**PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

* Defendants Xavier Becerra and Melanie Fontes Rainer, in their official capacities, have been substituted as parties pursuant to Federal Rule of Civil Procedure 25(d).

Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412, Plaintiffs in Case No. 19 Civ. 5433¹ and Case No. 19 Civ. 5435² (collectively the “Plaintiffs”) hereby move the Court for an award of \$907,407.71 in attorneys’ fees and costs to be paid by Defendants Xavier Becerra, the United States Department of Health and Human Services (“HHS”), Melanie Fontes Rainer, Director of the Office for Civil Rights, HHS, and the Office for Civil Rights, HHS (collectively “Defendants”). Plaintiffs are entitled to an award of attorneys’ fees because they are qualified, prevailing parties, Defendants’ position was not substantially justified, and no special circumstances make an award unjust. Moreover, the attorneys’ fees and costs Plaintiffs request are reasonable in light of the nature of the litigation and the relief obtained. Pursuant to the Court’s Order of April 2, 2024, Plaintiffs file this skeletal motion but reserve the right to defer all further filings, including, but not limited to, the submission of detailed costs and fees documentation, declarations supporting the application, and any amended fee application until the appropriate time. *See Planned Parenthood v. Azar*, No. 19 Civ. 5433 (PAE), Dkt. 138 (S.D.N.Y. Apr. 2, 2024); *Nat’l Fam. Plan. & Reprod. Health Assoc. v. Azar*, No. 19 Civ. 5435 (PAE), Dkt. 146 (S.D.N.Y. Apr. 2, 2024).

FACTUAL BACKGROUND

This litigation involves a challenge under the Administrative Procedure Act (“APA”) and United States Constitution to a federal rule promulgated by Defendant HHS purporting to implement a number of federal statutory provisions governing refusals to participate in certain medical procedures. *See Protecting Statutory Conscience Rights in Health Care; Delegations of*

¹ Planned Parenthood Federation of America, Inc. and Planned Parenthood of Northern New England, Inc (together, “Planned Parenthood Plaintiffs”).

² The National Family Planning and Reproductive Health Association (“NFPRHA”) and Public Health Solutions, Inc. (“PHA”).

Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (codified at 45 C.F.R. pt. 88) (“2019 Rule”). The 2019 Rule sought to create a new regime with sweeping enforcement powers, including by allowing objectors to refuse care to patients without prior notice and without providing a referral, and prohibiting health care employers from reassigning workers who refused to perform core functions of their job and from asking prospective employees about their willingness to perform essential aspects of their job.

This Court granted summary judgment to Plaintiffs and vacated the rule in its entirety. *See New York v. U.S. Dep’t of Health & Hum. Servs.*, No. 19 Civ. 4676 (PAE), Dkt. 248, 249 (S.D.N.Y. Nov. 6, 2019). The Court found that HHS lacked substantive rulemaking authority to promulgate significant portions of the rule; that HHS’s adoption of the rule was arbitrary and capricious; that the rule’s definition of “discrimination” was not a logical outgrowth of the rule as proposed; and that the rule’s remedial provision, which authorized termination of all HHS funding as a penalty for non-compliance, violated the Separation of Powers and the Spending Clause of the U.S. Constitution. *See id.*

Federal Defendants and Defendant-Intervenors appealed. *See id.*, Dkt. 255 (S.D.N.Y. Jan. 3, 2020). After briefing was completed, the appeal was held in abeyance pending review of the matter by new leadership at HHS. *New York v. U.S. Dep’t of Health & Hum. Servs.*, No. 19-4254, Dkt. 435 (2d Cir. Feb. 5, 2021). The parties then jointly stipulated to a dismissal of Federal Defendants’ and Defendant-Intervenors’ consolidated appeals without prejudice to any party’s ability to reinstate one or more of the appeals within 60 days after HHS has completed the process of revisiting the 2019 Rule, and the Second Circuit dismissed the consolidated appeals consistent with the stipulated request. *See id.*, Dkt. 534 (2d Cir. Dec. 7, 2022); *id.*, Dkt. 540 (2d Cir. Dec. 8, 2022). On January 5, 2023, Defendant HHS released a Notice of Proposed Rulemaking, which

proposed to rescind, in part, the 2019 Rule. *See* 88 Fed. Reg. 820, 824 (proposed Jan. 5, 2023). On January 11, 2024, Defendant HHS published a final rule that partially rescinded the 2019 Rule, noting that “significant questions have been raised as to the[] legality” of provisions of the 2019 Rule. *See Safeguarding the Rights of Conscience as Protected by Federal Statutes*, 89 Fed. Reg. 2078, 2078 (Jan. 11, 2024) (codified at 45 C.F.R. pt. 88). The 60-day window for reinstatement of the appeals ended on March 11, 2024, with no party moving to reinstate the appeals. Pursuant to this Court’s Order of January 11, 2023, Plaintiffs have timely filed this motion within 30 days of the expiration of the window for reinstatement of the appeals. *See New York v. U.S. Dep’t of Health & Hum. Servs.*, No. 19 Civ. 4676 (PAE), Dkt. 274 (S.D.N.Y. Jan. 11, 2023).

ARGUMENT

I. Plaintiffs Are Entitled to an Award of Attorneys’ Fees and Costs Under the EAJA.

Plaintiffs are entitled to an award of attorneys’ fees and costs under the EAJA, 28 U.S.C. § 2412(d)(1)(A), because they are (1) “prevailing parties”; (2) Defendants’ position was not “substantially justified”; and (3) there are no special circumstances making an award unjust. *See Gomez-Beleno v. Holder*, 644 F.3d 139, 144 (2d. Cir. 2011).

First, Plaintiffs are prevailing parties who have achieved a “judicially sanctioned” “material alteration” of their “legal relationship” with Defendants. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Hum. Res.*, 532 U.S. 598, 604–05 (2001); *see also Ma v. Chertoff*, 547 F.3d 342, 344 (2d. Cir. 2008). Plaintiffs brought suit to challenge the 2019 Rule; this Court granted summary judgment to Plaintiffs and vacated the 2019 Rule in full, *see New York v. U.S. Dep’t of Health & Hum. Servs.*, No. 19 Civ. 4676 (PAE), Dkt. 248 (S.D.N.Y. Nov. 6, 2019); Defendants failed to secure reversal, vacatur, or any other relief from that judgment on appeal; and Defendant HHS subsequently published a final rule that partially rescinded the 2019 Rule, relying

in part on this Court’s decision. *See* 89 Fed. Reg. at 2081 (citing *New York v. U.S. Dep’t of Health & Hum. Servs.*, No. 19 Civ. 4676 (PAE), Dkt. 248 (S.D.N.Y. Nov. 6, 2019)). Further, Plaintiffs are eligible “parties” because they are non-profit 501(c)(3) organizations that had no more than 500 employees at the time the actions were filed. *See* 28 U.S.C. § 2412(d)(2)(B).

Second, Defendants cannot establish that their position was “substantially justified”—in other words, “justified to a degree that could satisfy a reasonable person” or having a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see also Ericksson v. Comm’r of Soc. Sec.*, 557 F.3d 79, 81 (2d. Cir. 2009). The Court should review “both ‘the position taken by the United States in the civil action, [and] the action or failure to act by the agency upon which the civil action is based.’” *Ericksson*, 557 F.3d at 82 (quoting 28 U.S.C. § 2412(d)(2)(D)). The Court’s rationale—in holding that HHS violated the APA on *multiple* grounds—makes clear that the government’s position, both in adopting the 2019 Rule and in defending it, was not substantially justified. Defendant HHS’s primary justification for promulgating the 2019 Rule was a purported increase in the number of complaints relating to the Conscience Provisions, but, as this Court noted, this “central factual claim” was “flatly untrue,” “demonstrably false,” and “wholly unsupported by the record.”³ *New York v. U.S. Dep’t of Health & Hum. Servs.*, No. 19 Civ. 4676 (PAE), Dkt. 248, at 80–81, 88 (S.D.N.Y. Nov. 6, 2019); *see Ericksson*, 557 F.3d at 82 (noting no “reasonable basis in fact” where government “improperly disregarded or mischaracterized evidence”). Additionally, the 2019 Rule established an “extreme enforcement remedy”—terminating all of a recipient’s federal health care funds—which HHS

³ Indeed, HHS’s counsel, “once confronted by plaintiffs’ assessment of the administrative record after it was produced in this litigation, never stood by the claim in the Rule’s preamble that 343 complaints implicated the Conscience Provisions.” *New York v. U.S. Dep’t of Health & Hum. Servs.*, No. 19 Civ. 4676 (PAE), Dkt. 248, at 82 n.47 (S.D.N.Y. Nov. 6, 2019).

even “recogniz[ed] . . . would be *ultra vires*.” *New York v. U.S. Dep’t of Health & Hum. Servs.*, No. 19 Civ. 4676 (PAE), Dkt. 248, at 65, 68 (S.D.N.Y. Nov. 6, 2019).

Third, Defendants cannot meet their burden to establish that the “special circumstances” exception should apply, which “den[ies] awards where equitable considerations dictate an award should not be made.” *Vincent v. Comm’r of Soc. Sec.*, 651 F.3d 299, 303 (2d. Cir. 2011) (quoting *Scarborough v. Principi*, 541 U.S. 401, 422–23 (2004)). This exception, which may apply “when [a prevailing party’s] own misconduct created the circumstances that led to the litigation, and when that party’s contributions to the litigation’s success were marginal, duplicative and unnecessary,” is not implicated here. *Caplash v. Nielsen*, 294 F. Supp. 3d 123, 134 (W.D.N.Y. 2018) (alterations in original) (quoting *Vincent*, 651 F.3d at 304).

II. The Amount Requested is Reasonable.

Plaintiffs request a total of \$907,407.71 in attorneys’ fees and costs under the EAJA. Plaintiffs seek fees for 4,466.6 hours of attorney time (for a total of \$868,644.30) and 174.1 hours of paralegal time (for a total of \$17,410.00). Plaintiffs also seek \$21,353.41 in other costs. Both in total and in its component parts, this request is reasonable and commensurate with the complexity of the issues, the success of the litigation, and the relief obtained.⁴

Plaintiffs’ requested rates are reasonable. Under the EAJA, attorneys’ fees may be awarded at \$125 per hour, plus a cost-of-living adjustment. *See* 28 U.S.C. § 2412(d)(2)(A)(ii). Courts in the Second Circuit have routinely applied such an adjustment in awarding fees. *See Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 194 (2d. Cir. 2000) (noting cost-of-living adjustment may apply to

⁴ Because Covington & Burling’s representation in this case is pro bono, Covington policy requires that any fees that Covington recovers must be donated to charitable public interest or legal services organizations after the deduction of amounts necessary to cover expenses in the instance case and contribute to expenses incurred in the firm’s other pro bono matters.

statutory ceiling and should be calculated for each year). Plaintiffs seek the hourly rates shown in Table 1, which are calculated for each year, for each attorney based on the geographic region where they worked. These rates are a fair reflection of the adjusted maximum hourly rate under the EAJA. *See, e.g., Garcia v. Comm’r of Soc. Sec.*, No. 20-CV-7201, 2022 WL 1684280, at *2 (S.D.N.Y. May 26, 2022) (\$212.40 per hour in 2020; \$219.45 per hour in 2021; \$222.00 per hour in 2022); *Arnao v. Comm’r of Soc. Sec. Admin.*, No. 18-CV-6801, 2024 WL 710410, at *5 (S.D.N.Y. Feb. 21, 2024) (\$206.84 per hour in 2019; \$213 per hour in 2021); *Patterson v. Comm’r of Soc. Sec.*, No. 20-CV-4591, 2021 WL 4125013, at *2 (S.D.N.Y. Sept. 9, 2021) (\$212.40 per hour in 2020; \$216.41 per hour in 2021). Plaintiffs also seek hourly rates at \$100 for paralegal work, as a conservative estimate of the prevailing market rate for paralegals’ time. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008) (holding that a prevailing party under the EAJA may recover its paralegal fees at prevailing market rates); *Garcia*, 2022 WL 1684280, at *2 (finding \$100 per hour “reasonable and . . . consistent with hourly paralegal rates that have been approved by other courts in this District”).

Table 1 – Hourly Rates with Cost-of-Living Adjustment⁵

	2019	2020	2021	2022	2023	2024
New York	\$208.83	\$212.40	\$219.44	\$232.84	\$241.74	\$246.48
Washington, D.C.	\$208.95	\$210.82	\$219.17	\$233.68	\$240.94	\$244.60
San Francisco/Palo Alto	\$241.17	\$245.33	\$253.21	\$267.38	\$277.18	\$282.17
Los Angeles	\$217.83	\$221.37	\$229.85	\$246.97	\$255.55	\$260.20

The total hours billed for this matter are “reasonable in light of the issues presented, counsel’s experience, and the quality of representation provided.” *See Arnao*, 2024 WL 710410, at *4. As set forth in Appendix A, Plaintiffs request recovery for 4,466.6 attorney hours and 174.1 paralegal hours. These hours reflect work performed over multiple stages of litigation, in both this Court and in the Second Circuit. In requesting recovery for 4,466.6 hours worked, Plaintiffs’ counsel have declined to ask for recompense for significant time actually spent on this matter. Plaintiffs’ attorneys’ hours are reasonable when considering the “factual, substantive, and procedural complexity of the case” and the “efficacy of the attorney[s]’ efforts.” *Patterson*, 2021 WL 4125013, at *3 (citation omitted).

Finally, Plaintiffs seek \$21,353.41 in additional costs. These “[r]easonable out-of-pocket expenses are generally reimbursed as a matter of right in connection with an award of attorneys’ fees.” *Barbour v. Colvin*, 993 F. Supp. 2d 284, 292 (E.D.N.Y. 2014). These costs include costs for travel and lodging, filing fees, process servers, printing and duplicating, telephone calls, and

⁵ These adjustments were “calculated . . . by multiplying the \$125 statutory rate by the annual average consumer price index figure for all urban consumers (‘CPI-U’) for the years in which counsel’s work was performed, and then dividing by the CPI-U figure for March 1996, the effective date of EAJA’s \$125 statutory rate.” *See R.F.M. v. Nielsen*, No. 18-CV-5068, 2020 WL 6393583, at *3 n.7 (S.D.N.Y. May 4, 2020) (cleaned up), *report and recommendation adopted*, 2020 WL 6393718 (S.D.N.Y. May 20, 2020).

legal research charges, all of which are routinely recoverable. *See, e.g., Larsen v. JBD Legal Grp., P.C.*, 588 F. Supp. 2d 360, 365–66 (E.D.N.Y. 2008) (awarding costs for photocopies, telephone calls, postage, FedEx costs, court-imposed filing fees, process servers, transcripts, and transportation).

CONCLUSION

Plaintiffs respectfully request that the Court award Plaintiffs' attorneys' fees and costs of \$907,407.71 as detailed above.

Dated: April 10, 2024

Respectfully submitted,

/s/ David M. Zions

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Appendix A

Appendix A – Attorney Hours and Calculation of Fees Requested

Covington & Burling LLP							
Name	Title	2019	2020	2021	2022	2023	2024^a
<i>New York</i>							
Cristina Alvarez	Associate	112.2	8.5	0	0	0	0
Sarah Mac Dougall	Associate	390.6	305	7.1	0	0	0
Total Attorney Hours		502.8	313.5	7.1	0	0	0
Total Attorneys' Fees		\$104,999.14	\$66,588.15	\$1,558.06	0	0	0
<i>Washington, D.C.</i>							
Rebecca DiPietro	Associate	0	0	0	0	0	45.1
Bradley Ervin	Associate	37.4	0	0	0	0	0
David Zionts	Partner	136	88.7	0.3	1.4	2	0
Total Attorney Hours		173.4	88.7	0.3	1.4	2	45.1

^a Plaintiffs have included in their calculation attorney fees for hours incurred preparing this fee application through March 2024. *See Black v. Nunwood, Inc.*, No. 13-cv-7207, 2015 WL 1958917, at *7 (S.D.N.Y. Apr. 30, 2015) (“It is well established that ‘time reasonably spent by plaintiff’s attorneys in establishing their fee [is] compensable.’” (quoting *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979))). Plaintiffs reserve the right to recover for additional time spent litigating attorneys’ fees from April 2024 onward.

Appendix A

Total Attorneys' Fees		\$36,231.32	\$18,700.15	\$65.75	\$327.15	\$481.88	\$11,031.56
<i>San Francisco/Palo Alto</i>							
Kurt Calia	Partner	470.8	17.6	2.2	4.6	3.9	3.1
Marina Dalia-Hunt	Associate	81.6	0	0	0	0	0
Morgan Lewis	Associate	98.8	10	0	0	0	0
Total Attorney Hours		651.2	27.6	2.2	4.6	3.9	3.1
Total Attorneys' Fees		\$157,052.49	\$6,771.03	\$557.05	\$1,229.95	\$1,081.01	\$874.73
<i>Los Angeles</i>							
Paulina Slagter	Associate	331.3	125.1	14.3	1.3	0.1	0
Ryan Weinstein	Special Counsel	232.1	0.7	0	0	0	0
Total Attorney Hours		232.1	0.7	14.3	1.3	0.1	0
Total Attorneys' Fees		\$50,557.74	\$ 154.96	\$3,286.86	\$321.06	\$25.55	0
<i>Paralegals</i>							
Timothy Aulet	Paralegal	0	12.5	0	0	0	0
Ellen Chiulos	Paralegal Specialist	7.1	0	0	0	0	0
Katherine Hancock	Paralegal	9	0	0	0	0	0

Appendix A

Rohna Houston	Paralegal Specialist	15.9	0	0	0	0	0
Sarah Reeves	Paralegal	5.2	0	0	0	0	0
Robert Reznick	Paralegal	0	21.4	0.2	0	0	0
Damani Roberts-Heyliger	Paralegal	7.5	0	0	0	0	0
Julie Romanow	Paralegal Specialist	88.7	6.6	0	0	0	0
Total Paralegal Hours		133.4	40.5	0.2	0	0	0
Total Paralegal Fees		\$13,340.00	\$4,050.00	\$20.00	0	0	0
Total Covington Attorneys' Fees		\$461,895.58					
Total Covington Paralegal Fees		\$17,410.00					
Total Covington Fees (Attorneys and Paralegals)		\$479,305.58					

Appendix A

Planned Parenthood Federation of America (Washington, D.C.)							
Diana Salgado	Senior Director	369.9	105.6	0.9	2	3.2	0
Hana Bajramovic	Staff Attorney	443.1	165.6	0	0	0	0
Total Attorney Hours		813	271.2	0.9	2	3.2	0
Total Attorneys' Fees		\$169,873.50	\$57,175.65	\$197.25	\$467.36	\$771.00	0
Total PPFA Attorneys' Fees		\$ 228,484.76					
National Women's Law Center (Washington, D.C.)							
Michelle Banker	Director	347.6	52	0	0	1.3	0
Sunu Chandy	Legal Director	3	5	0	0	0	0
Total Attorney Hours		350.6	57	0	0	1.3	0
Total Attorneys' Fees		\$73,256.64	\$12,017.01	0	0	\$313.22	0
Total NWLC Attorneys' Fees		\$85,586.87					

Appendix A

American Civil Liberties Union (New York)							
Lindsey Kaley	Staff Attorney	138.3	36.1	0	0	0	0
Alexa Kolbi-Molinas	Deputy Director	181	86.3	0	0	0	0
Total Attorney Hours		319.3	122.4	0	0	0	0
Total Attorneys' Fees		\$66,679.05	\$25,998.05	0	0	0	0
Total ACLU Attorneys' Fees		\$92,677.10					